

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 17, 2009 Session

**JOELTON PLANNING AND ZONING COMMITTEE and JERRY
STRANGE**

v.

**THE METROPOLITAN GOVERNMENT OF NASHVILLE AND
DAVIDSON COUNTY, TENNESSEE**

**Appeal from the Chancery Court for Davidson County
No. 07-2513-II Claudia Bonnyman, Chancellor**

No. M2009-00268-COA-R3-CV - Filed December 21, 2009

This is a zoning appeal. The zoning applicant owns a tract of land, most of which was zoned for agricultural use. A small portion of the tract, which allowed access to the nearest public roadway, was zoned for residential use. The zoning applicant desired to use the land for a campground, but the municipal code permits campgrounds only on land zoned for agricultural use. Consequently, the zoning applicant applied for a special zoning exception permit for the small residential tract. The rules of procedure for the board of zoning appeals required the zoning applicant to send a notice to nearby landowners, including a meeting place, date and time for interested persons to meet with the zoning applicant prior to the hearing before the board. The zoning applicant circulated a letter of notice with only an email address and a telephone number. After the hearing, the board of appeals approved the application and issued the permit. A community member opposing the permit filed the instant petition for a writ of certiorari, seeking judicial review of the zoning board's decision. The trial court held that the zoning applicant's failure to offer a meeting prior to the board's hearing was a fatal defect in the issuance of the permit. In the alternative in the event of an appeal, the trial court also held that the issuance of the permit for land partially zoned residential was not erroneous because the residential-zoned land would be used only for ingress and egress. The community member appeals. We affirm the trial court's holding that the offer of a meeting was required, and thus vacate the issuance of the permit and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Joe F. Gillespie, Jr., Joelton, Tennessee for the Petitioner/Appellant Jerry Strange

Sue B. Cain, Lora Barkenbus Fox, and Jeff Campbell, Nashville, Tennessee for the Respondent/Appellee Metropolitan Government of Nashville and Davidson County, Tennessee

OPINION

FACTS AND PROCEEDINGS BELOW

Provision International, Inc. (“Provision”), a religious organization, owns a seventy-acre tract of land in Joelton, Tennessee, called “Eagles Landing.” The vast majority of the tract of land was zoned for agricultural use. A small segment, connecting the large agricultural tract to the only public roadway, was zoned for residential use.

As part of a discipleship mentorship program, Provision sought to use Eagles Landing as a campground “to raise up young adults to make a difference in . . . society.” Provision envisioned putting the campground on the large agricultural portion of the land, and putting a driveway for ingress and egress on the small residential-zoned segment that abutted the public road. In order to use Eagles Landing in this fashion, Provision applied to renew an expired recreation and entertainment special exception permit under Nashville Metropolitan Code § 17.16.220. The special exception permit would allow Provision to put a driveway on the small residential-zoned segment.¹

The Zoning Administrator for the Respondent/Appellant Metropolitan Government of Nashville and Davidson County (“Metro”) apparently denied Provision’s application for the special exception permit.² Consequently, on July 25, 2007, Provision appealed the decision to Metro’s Board of Zoning Appeals (“BZA”). The appeal was set for a public hearing before the BZA on September 6, 2007.

Apparently, for many years, Provision had had a contentious relationship with adjacent landowners, including Petitioner/Appellant Jerry Strange (“Strange”). Neighbors had complained of noisy rock concerts,³ construction and commercial activity occurring at Eagles Landing. When word of Provision’s pending permit application spread throughout the community, many residents

¹ It is undisputed on appeal that the large agricultural segment is zoned properly for a campground.

² The appellate record does not contain a denial; however, on the form for the appeal to the Metropolitan Board of Zoning Appeals, it states, “[t]he undersigned hereby appeals from the decision of the Zoning Administrator, wherein a Zoning Permit/Certificate of Zoning Compliance was refused.”

³ For example, neighbors alleged that, during the summer of 2007, Provision held “God’s Summer of Love Tour- From Nashville to San Francisco” on the land. The event allegedly consisted of “worship late into the night, with intercession, *drum circles*, car painting, *jam sessions*, and *equipping and releasing for young artists and musicians of this new Renaissance movement of God*.”

signed a petition to express their opposition to the issuance of a special exception permit for the small residential segment of land.⁴

Prior to the public hearing, the BZA notified Provision of actions that the BZA Rules of Procedure required of Provision before the hearing. The BZA notice informed Provision: “In the interest of having informed stake holders in special exception cases before the [BZA],” Rule 9(2)(e) of the BZA Rules of Procedure required Provision to “contact . . . the district councilperson and neighbors within 300 feet of the subject property from a mailing list provided by” the BZA. Additionally, the Rule specified that the notice letter was required to include a contact person, a reasonable representation of the proposal, and a convenient place, date and time for a meeting with Provision prior to the BZA hearing. The BZA directive informed Provision that it would have to present BZA documentation of its efforts to contact interested persons.

Thereafter, Provision’s Director, Scott MacLeod (“MacLeod”), sent a letter to the persons on the BZA’s mailing list. In the letter, MacLeod detailed Provision’s history and his vision for Eagles Landing. After alluding to the pending special exception permit appeal, MacLeod’s letter stated: “If you have any questions or concerns, please feel free to contact me directly so we can personally share the vision with you” and provided the recipient an email address and a telephone number.

On September 6, 2007, the public hearing before the BZA was held as scheduled. At the hearing, MacLeod made a presentation on behalf of Provision for issuance of the permit. Some members of the community spoke in favor of issuing the permit, citing Provision’s work with children. Other community members spoke in opposition, voicing concerns about noise and safety.

In the course of the hearing, members of the BZA questioned MacLeod about the notice provided to the community. MacLeod told them that the notice letter had been circulated, but acknowledged that Provision made no attempt to hold a community meeting. MacLeod explained, “[S]eeing the way people have reacted and responded ah, is partly why we’ve been a little shy of meeting with the whole community at this point.”

At the close of the public hearing, the BZA members discussed the merits of the permit application. Some BZA members had misgivings about issuing the permit in light of the considerable opposition from the neighbors and the lack of an offer for a community meeting. Nevertheless, at the conclusion of the hearing, the BZA voted unanimously to approve the special exception permit, with the proviso that Provision could have no more than one hundred persons in attendance at events at Eagles Landing.

⁴ The petition is approximately 114 pages with 7 signatures per page.

Less than two weeks later, the attorney for Petitioner Joelton Planning and Zoning Committee (“Committee”)⁵ and Petitioner Strange (collectively “Petitioners”) wrote a letter to the BZA chairperson, requesting that the issuance of Provision’s permit be reconsidered pursuant to BZA Rule of Procedure 8(5).⁶ The letter asserted that Provision’s special exception permit was obtained through false information. Among other things, the letter noted that in its BZA appeal application, Provision had falsely represented that the entirety of Eagles Landing was zoned agricultural, when in fact a portion of Eagles Landing was zoned for residential use. The letter asserted that, under the Nashville Metropolitan Code, a special exception permit for a camp cannot be issued for land that is zoned residential.

After reviewing the allegations of the Petitioners’ letter⁷ and Provision’s response, the BZA unanimously denied the Petitioners’ request for a rehearing on Provision’s permit.⁸

On November 9, 2007, Strange and the Committee filed a petition for a writ of certiorari and supersedeas pursuant to Tennessee Code Annotated § 27-9-101, *et. seq.*,⁹ seeking judicial review of the BZA’s issuance of the permit to Provision. The petition named Metro as the Respondent. The petition alleged that the BZA’s issuance of the special exception permit was illegal, arbitrary and capricious because, *inter alia*, part of Eagles Landing was zoned for residential use, and was thus ineligible for a special exception permit for a campground under the Nashville Metropolitan Code. The petition also alleged that Provision’s failure to offer a public meeting prior to the BZA hearing contravened the BZA Rules of Procedure.

⁵ The Joelton Planning and Zoning Committee is apparently comprised of residents who are neighbors of the Eagles Landing property.

⁶ Rule 8(5) of the BZA Rules of Procedure provides as follows:

The witnesses appearing before the board in public hearing shall not be required to testify under oath, but all witnesses shall be made aware if it is determined that false information has been presented to the board, the board has the right to reconsider their decision.

⁷ The Petitioners’ attorney apparently sent the BZA chair two subsequent letters to supplement his original letter.

⁸ The record indicates that a second and a third request for a rehearing were considered at the November 1, 2007 and November 15, 2007 meetings of the BZA, respectively; both were denied.

⁹ The petition stated that it was filed pursuant to Tennessee Code Annotated § 20-9-101, *et. seq.*, which pertains to the recording of court proceedings, while Tennessee Code Annotated § 27-9-101, *et. seq.*, is the proper vehicle for judicial review in this case. *See Lewis v. Bedford County Bd. of Zoning Appeals*, 174 S.W.3d 241, 246-47 (Tenn. Ct. App. 2004). We presume this was a typographical error.

The writ was granted.¹⁰ Thereafter, the administrative record was filed and an agreed scheduling order was entered.

On September 30, 2008, the trial court conducted a hearing on the petition. At the outset, the trial court dismissed the Committee on grounds of standing, concluding that the Committee was not a proper party.¹¹ After hearing the parties' arguments, the trial court held that Provision's failure to offer a public meeting prior to the BZA hearing violated the BZA Rule of Procedure that mandated that a permit applicant "shall" offer such a meeting. The trial court further held: "In an alternative ruling in the event the Court of Appeals finds the offer of a meeting between [Provision] and adjoining landowners was not mandatory," the trial court found that the issuance of the special exception permit for a campground on land encompassing some land that was zoned residential was not improper because the residential-zoned land would be used only for ingress and egress to the agricultural-zoned land. At the close of the hearing, the trial court remanded the case to the BZA for the purpose of allowing Provision to comply with the BZA Rules of Procedure by offering a public meeting prior to issuance of the permit. On October 21, 2008, the trial court entered a written order consistent with its oral ruling.

Subsequently, Metro filed a motion to alter or amend, seeking clarification. An agreed order was entered clarifying that the trial court's prior order had in fact revoked Provision's special exception permit. Thereafter, Petitioner Strange appealed.¹²

ISSUES ON APPEAL AND STANDARD OF REVIEW

On appeal, Appellant Strange argues that the trial court erred in its alternative ruling that the Board's issuance of a special exception permit to Provision was not improper. Appellee Metro asserts on cross-appeal that the trial court erred in vacating the special exception permit on the ground that Provision did not comply with the BZA Rule requiring it to offer to hold a public meeting.

"The scope of judicial review under the common law writ of certiorari is narrow and is limited to whether the inferior board or tribunal has exceeded its jurisdiction or acted illegally,

¹⁰ After Chancellor Carol L. McCoy recused herself, the case was reassigned to Chancellor Claudia C. Bonnyman.

¹¹ At the hearing, the trial court questioned Petitioner's counsel about the Committee's role in the case. Petitioner's counsel told the court that the Committee formed as a direct result of this controversy. The trial court concluded that the Committee was not an aggrieved party. This holding is not raised as an issue on appeal.

¹² In his appellate brief, Petitioner makes a cryptic reference to Provision holding "a public hearing" after entry of the trial court's order of October 21, 2008. We find no indication of such a public hearing in the appellate record. Attachments to appellate briefs and references in appellate briefs are not supplements to the appellate record. *See UT Med. Group, Inc. v. Vogt*, 235 S.W.3d 110, 122 (Tenn. 2007) (citing *Sherrod v. Wix*, 849 S.W.2d 780, 783 (Tenn. Ct. App. 1992)). We cannot take judicial notice of materials simply appended to or included in briefs that are not properly made part of the record on appeal. *Willis v. Tenn. Dept. of Corr.*, 113 S.W.3d 706, 713 n.6 (Tenn. 2003).

arbitrarily, or fraudulently.” *Lewis v. Bedford County Bd. of Zoning Appeals*, 174 S.W.3d 241, 245 (Tenn. Ct. App. 2004) (citing *Willis v. Tenn. Dep’t of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003); *Petition of Gant*, 937 S.W.2d 842, 844-45 (Tenn. 1996)). On appeal, our review of the board’s decision “is no broader or more comprehensive than that of the trial court.” *Pirtle v. Tenn. Dep’t of Corr.*, No. W2006-01220-COA-R3-CV, 2007 WL 241027, at *2 (Tenn. Ct. App. Jan. 30, 2007) (quoting *Watts v. Civil Serv. Bd. of Columbia*, 606 S.W.2d 274, 277 (Tenn. 1980)). However, we review the trial court’s conclusions of law *de novo* with no presumption of correctness. *Nashville Ford Tractor, Inc. v. Great Am. Ins. Co.*, 194 S.W.3d 415, 425 (Tenn. Ct. App. 2005).

ANALYSIS

Metro argues that the trial court erred in revoking the Board’s issuance of a special exception permit to Provision on the basis that Provision’s failure to offer a community meeting prior to the BZA hearing violated Rule 9 of the BZA’s Rules of Procedure. In support of this contention, Metro asserts that the consequence of not offering a meeting was deferral, not denial; that Provision substantially complied with the Rule 9 by providing contact information and an offer to meet with neighbors individually; and that the failure to comply is harmless error because community opposition to Provision’s application was vocal and vehement.

At all pertinent times to this appeal,¹³ Rule 9(2)(e) of the BZA’s Rules of Procedure provided as follows:

In the interest of having informed stake holders in special exception cases before the board, it is required that the appellant make contact with the district councilperson and neighbors within 300 feet of the subject property from a mailing list provided by the board staff. Such mailing shall be posted no more than 14 calendar days from the public hearing on your appeal case. Information in the letter shall include a contact person/persons and include a reasonable representation of your proposal before the board. A convenient meeting place, date and time shall be included for interested persons to meet with the applicant prior to the hearing.

¹³ In March 2008, approximately six months after BZA granted the permit at issue to Provision, BZA amended Rule 9(2)(e) to state as follows:

In the interest of having informed stake holders in special exception cases, it is required that the appellant make contact with the district councilperson and neighbors within 300 feet of the subject property (from a mailing list provided by the Board’s staff). Information to be furnished by the applicant shall include a contact person and include a reasonable representation of your proposal and hold a meeting at a geographically convenient place, date and time. Applicant shall document to the Board that this requirement has been met. Failure to comply may result in deferral of your case.

Because this amendment occurred after BZA issued the permit at issue, it is not applicable to this appeal.

The aim of statutory construction is to ascertain and give effect to intent or purpose. *Worrall v. Kroger Co.*, 545 S.W.2d 736, 738 (Tenn. 1977) (citing *State ex rel. Rector v. Wilkes*, 436 S.W.2d 425 (Tenn. 1968)). The intent or purpose “is to be ascertained primarily from the natural and ordinary meaning of the language used, when read in ... context . . . , without any forced or subtle construction to limit or extend the import of the language. *Id.* (citing *State ex rel. Rector v. Wilkes*, 436 S.W.2d 425 (Tenn. 1968)). We look at the plain language when interpreting rules of administrative agencies as well. *See Kidd v. Jarvis Drilling, Inc.*, No. M2004-00973-COA-R3-CV, 2006 WL 344755, at *4 (Tenn. Ct. App. Feb. 14, 2006).

Reviewing the language of BZA Rule 9(2)(e), we must agree with the trial court that the offer of a public meeting, if not the actual occurrence of a meeting, was required. The language of Rule 9(2)(e) is mandatory; it states that “[a] convenient meeting place, date and time *shall* be included *for interested persons to meet with the applicant prior to the hearing.*” The Rule specifies that the purpose for the notice and meeting requirement is “[i]n the interest of having informed stake holders . . . before the [BZA].” In his letter to interested persons, it is undisputed that Provision director MacLeod did not offer a “convenient meeting place, date and time” for interested persons to meet with Provision representatives. Instead, MacLeod provided only an email address and telephone number, and an invitation to contact him individually “so we can personally share the vision with you.” As found by the trial court, this offer does not comport with the requirements of BZA Rule 9.

Metro first argues that the consequence of failing to meet the requirements of Rule 9 is deferral of the permit hearing, not denial. In support, Metro points to a letter from a Zoning Appeals Specialist to MacLeod advising him of the requirement to make contact with interested persons, and stating “[f]ailure to meet this requirement could result in deferral of your public hearing.” Perhaps this argument would be persuasive if the issue on appeal were whether the Board could defer the hearing on Provision’s application for a permit. However, it is unpersuasive on the issue raised in this appeal.

Metro also contends that McLeod’s provision of a contact email address and telephone number, coupled with an open invitation to discuss the matter individually, substantially complies with the requirements of BZA Rule 9. We disagree. The offer in McLeod’s letter is not the equivalent of the offer for a public meeting, as mandated by the plain language of the BZA Rule.

Finally, Metro argues that Provision’s failure to comply with the requirements of BZA Rule 9 is harmless error because community opposition to Provision’s Eagles Landing camp was widespread, vocal, and vehement. In particular, Metro points to the broadly worded petition¹⁴ endorsed by community members opposed to the issuance of the permit to Provision. We disagree with this argument as well. Where the Board’s own rules mandate that an applicant offer to hold a

¹⁴ The petition states that the undersigned are opposed to “any proposed changes in zoning, any proposed change of use permits, special exception permits and any proposed building permits associated with” Eagles Landing.

public meeting with interested persons, we are not at liberty to find that the failure to offer such a meeting is harmless error because there were numerous interested persons who felt strongly about the issue.

Thus, we find that the trial court did not err in vacating the Board's issuance of the special exception permit to Provision. This holding pretermits all other issues raised on appeal.

The decision of the trial court is affirmed. The costs of this appeal are taxed to the Appellant Jerry Strange, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE